

***United States Court of Appeals
for the Second Circuit***

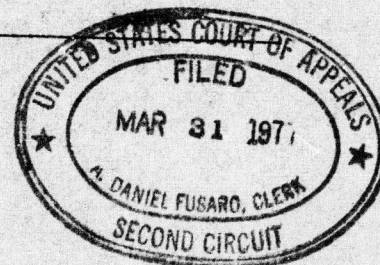


**BRIEF FOR
APPELLEE**

77-7004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-7004

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
DOCKET NO. 75-125



LAWRENCE BATEMAN
VS.
NORWICH UNIVERSITY, LORING E. HART,
INDIVIDUALLY AND AS PRESIDENT OF NORWICH UNIVERSITY,
AND
JOHN B. WADSWORTH, JR.,
INDIVIDUALLY AND AS COMMANDANT OF CADETS OF NORWICH UNIVERSITY

Bp/s

BRIEF FOR DEFENDANTS-APPELLEES

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PROCEEDINGS BELOW

The instant case was initiated by Summons and Complaint dated May 14, 1975 seeking, inter alia, injunctive and monetary relief against the Defendant Norwich University and two of its principal officers, Loring E. Hart and John B. Wadsworth, President and Commandant of Cadets respectively, on behalf of a former student of the University. The Complaint sets forth three separate theories of liability, the first two being civil rights causes of action under Federal question jurisdiction pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1985(3) and the third being an alleged breach of contract by the Defendant University, with jurisdiction based upon diversity of citizenship.

The Defendants filed Motions to Dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure relative to the civil rights causes of action and for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure relative to the breach of contract cause of action. By Opinion and Order dated March 17, 1976, the United States District Court for the District of Vermont (Coffrin, J., presiding) granted the Defendants' Motion for Summary Judgment on the Plaintiff's claim of breach of contract and dismissed the claim based upon 42 U.S.C. §1985(3). The Court, in its Order, gave the Plaintiff 60 days in which to conduct discovery relative to its §1983 claim, more specifically on the question of state action. The Plaintiff failed to conduct further discovery and by an Opinion and Order dated November 26, 1976 the Court granted the Defendants' Motion to Dismiss the §1983 claim. The Plaintiff filed his Notice of Appeal on December 3, 1976. The Plaintiff is appealing only that part of the Court's Order in that it granted the Defendants' Motion for Summary Judgment on the

issue of the alleged breach of contract. The Plaintiff is not appealing the Court's Orders as they pertain to the dismissal of the §1983 and 1985(3) actions.

STATEMENT OF FACTS

The Defendant, Norwich University, is a four year private non-sectarian military college located in Northfield, Vermont. The Defendant, Loring E. Hart, is the President of Norwich University and the Defendant, John B. Wadsworth, Jr. is the Commandant of the Norwich University Corps of Cadets. The University has no connection with the State of Vermont or any other State nor does it have any relationship with the United States Government other than the fact that it conducts an Army and Air Force ROTC program like many other private educational institutions.

Since the University is a military institution, its student body is organized into a corps of cadets. As such, all members of the corps are subject to the Regulations of the Norwich University Corps of Cadets. The Plaintiff was subject to the regulations just like any other cadet and reference is made to the Plaintiff's certificate that he read and understood the Regulations of the Norwich University Corps of Cadets. The Regulations contain the procedures by which a member of the Corps may be found guilty of a violation of the Honor Code and consequently subject to dismissal from the University. (See Regulations, pages 56-73, 90-93 and Cadet Handbook pages 41-48, Exhibit 5 submitted with Motion for Summary Judgment). All members of the Corps of Cadets of Norwich University are subject to the Honor Code. The Honor Code and adherence to it are a fundamental and integral part of the educational philosophy and structure of Norwich University. The general principles of the Honor Code are very simple. Specifically, they require that a member of the Corps never lie, cheat, evade the truth, conspire to deceive, or steal, to the end that confidence and trust may be had in his words and actions. (See Regulations

and Handbook, Exhibits 5 and 7 submitted with Motion for Summary Judgment).

The Honor Code is administered by an Honor Committee composed of members of the senior class, assisted by Honor representatives from the junior class. The Committee interprets the Honor Code for the students, explains the principles upon which it is based, and brings violations of it into the open, and recommends action upon finding of a violation of the Honor Code.

The Plaintiff was found to be in violation of the Honor Code after a hearing on April 15, 1975. The regulations of the Norwich University Corps of Cadets set forth the procedures by which a student may be found in violation of the Honor Code. Under the regulations, once an alleged violation is reported to a member of the Honor Committee, the person alleged to be in violation of the Honor Code is informed of the charges against him and the sanctions which may be applied if the charges are proven. The person against whom the charges are made is given a hearing not less than 48 hours after the violation is alleged. In the instant case the Plaintiff Bateman was informed in writing on April 10 of the pending charge against him and the hearing was not conducted until April 15.

The student has a right to be present at such hearing and to present witnesses on his own behalf and has the right to cross-examine adverse witnesses. The accused also has the right to be assisted in his defense by any fellow student of his choice, which the Plaintiff Bateman was. Under the Regulations he is not entitled to legal counsel, nor is the Honor Committee itself entitled to legal counsel. After the hearing, a determination is made by the Honor Committee as to whether or not a violation of the Honor Code has occurred. If it is determined that a violation has occurred, the Committee then recommends the appropriate sanction.

In the instant case the Honor Committee, after a full hearing participated in by the Plaintiff, recommended that the Plaintiff be dismissed from the University for a violation of the Honor Code. Specifically, the Plaintiff was found to have siphoned gas from a fellow cadet's car. It is clear from the regulations that a cadet found guilty of stealing is subject to dismissal as provided in the Honor Code. (See Regulations, page 70).

It is important to note that the information lodged against the Plaintiff Bateman stated, among other things, that "you have the right to be present at all open sessions, to present a defense and witnesses in your own behalf, and the right to cross-examine all adverse witnesses. You may present evidence in your own behalf, or testify in person, or submit a written statement, and submit a brief". (Exhibit 8, submitted with Motion for Summary Judgment) (Emphasis Added). In addition the statement informed the Plaintiff Bateman that Security Officials Jennings and Winberg had provided written statements which he could examine if he so desired. The Plaintiff was again informed of all these rights immediately prior to the commencement of the hearing of April 15, 1975. (Exhibit 9, transcript of April 15 hearing, page 2, submitted with Motion for Summary Judgment).

A cadet is given the right to appeal the Honor Committee's finding to the President of the University and the Plaintiff did so appeal in this case.

In fact, at the conclusion of the April 15 hearing, the Plaintiff was advised of the following:

You are advised that an appeal may be made in writing to the President of Norwich University within 24 hours after you have been advised of the sanction to be imposed. In order for the appeal to be considered, it must present substantial new evidence or a question whether the evidence presented was sufficient, question the Hearing Committee's conduct, question the application

of due process or indicate that the sanction imposed was not in keeping with Norwich University policy in such matters. (Exhibit 9, transcript of April 15 hearing, page 40, submitted with Motion for Summary Judgment) (Emphasis Added).

Upon review of the findings and recommendations of the Honor Committee, the Defendant and President of the University, Loring Hart, agreed to permit the Plaintiff, in view of the fact that only five weeks remained in the semester, to continue the academic program as a non-corps student subject to the Plaintiff's agreement that he would not associate himself with the Corps of Cadets and would only come on to campus to attend classes and consult with professors. (Exhibit 1, Affidavit of Defendant Hart, submitted with Motion for Summary Judgment). The Plaintiff was not to enter into any dormitories and he was required to check in and check out of the campus.

On May 9, 1975, it was brought to the attention of the Commandant of the Corps of Cadets that the Plaintiff had been in violation of the terms of the agreement in that he had been in the dormitories on more than one occasion and had failed to sign in and sign out as required in the agreement of April 24, 1975. These facts were presented to the Plaintiff by the Commandant of the Corps of Cadets, the Defendant Colonel Wadsworth, and the Plaintiff Bateman admitted his violation of the agreement. The Defendant Wadsworth recommended the Plaintiff's dismissal and the Plaintiff appealed again to the President of the University who affirmed the recommendation of the Defendant Wadsworth. As a result, the Plaintiff was removed from the University on May 9. The Plaintiff Bateman personally admitted the violation of the agreement to President Hart. (Exhibits 1 and 2, Affidavits of Defendants Wadsworth and Hart, submitted with Motion for Summary Judgment).

One other observation relative to the facts of the instant case deserves emphasis. First of all, when the Plaintiff entered into his agreement with President Hart he was no longer a member of the Corps of Cadets, but received special treatment as a result of President Hart's desire not to impose undue hardship on the Plaintiff in view of the fact that only 5 weeks remained in the semester. In short, the Plaintiff was granted a unique and special status as a member of the University community. It is also clear that if the Plaintiff had indicated any desire to have Mr. Winburg, a security officer, present at the hearing, he would have been produced by the Chairman of the Honor Committee. (Exhibits 4 and 9, Affidavit of Cadet Dufresne and Transcript of Hearing, page 3, submitted with Motion for Summary Judgment).

ISSUE PRESENTED

I. WAS THE COURT BELOW CORRECT IN GRANTING THE DEFENDANTS-APPELLEES' MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFF'S CLAIM OF BREACH OF CONTRACT?

ARGUMENT

I. THE DEFENDANTS-APPELLEES WERE IN COMPLIANCE WITH ALL CONTRACTUAL OBLIGATIONS ARISING OUT OF THE PLAINTIFF'S ATTENDANCE AT NORWICH UNIVERSITY, CONSEQUENTLY THE COURT BELOW CORRECTLY GRANTED THE DEFENDANTS-APPELLEES' MOTION FOR SUMMARY JUDGMENT ON THIS ISSUE.

A. Vermont Law is applicable to the issue presented by the Plaintiff-Appellant on appeal.

It is to be emphasized again that Norwich University is a private university which does not have any connection with the State of Vermont and does not have any connection with the Federal Government or the United States Military other than the fact that it does conduct an ROTC Program. The ROTC Program is divorced from the Corps of Cadets and the United States Military, or any other agency of the Federal Government, does not exercise any control over the Corps or the regulations under which it is governed, nor does it approve or disprove or have any control over the administration of the Honor Code. As such, the University was acting within its private capacity at all material times and as such, the alleged contractual obligations arising between the Plaintiff-Appellant and the Defendants-Appellees must be ascertained under the law of the State of Vermont and not under any Constitutional or federal statutory claims. Since jurisdiction on this particular issue, i.e., breach of contract, was predicated upon diversity

of citizenship, Vermont law clearly governs. Erie Railroad Company v. Tompkins, 304 U.S. 64 (1936).

As the court below correctly pointed out in its Opinion and Order of March 17, 1976, "The Vermont Supreme Court has never determined specifically whether an implied contract arises upon the enrollment of a student in a university or whether the terms of such contract are embodied in the University rules and regulations, or other official publications." (Opinion and Order, page 5, March 17, 1976). However, the attitude of the Vermont Supreme Court towards judicial interference with the internal disciplinary proceedings of educational institutions, in similar situations, may be ascertained in the case of Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321 (1975), where the court stated:

Educational institutions have both a need and a right to formulate their own standards and to enforce them nor would it be at all unusual for the temporary relief here sought to enable the Plaintiff to complete his education, thus effectively completing an "end run" around the disciplinary rules and procedures of the college. (Emphasis Added).

Nzuve, supra, involved a state college and not a private university such as Norwich. Consequently it would seem that the attitude towards judicial interference would be even more pronounced in the instant case. In the context of private institutions, considerable disagreement exists in other jurisdictions concerning the right attaching to a student embodied in the implied terms of a "contract of admission". See 58 ALR, 2d, Anno: Student - Discipline - Right to a Hearing, 905.

The court below did recognize that enrollment in a university does establish certain rights and obligations of a contractual nature and that Vermont does recognize that contracts may arise by implication. As stated

in Cushman v. Outwater, 121 Vt. 426, 429 (1960):

A ceremonial formulation by the parties of the contract terms, either oral or written, is not a prerequisite to the existence of an agreement. The contract and its terms may be implied from the facts surrounding the transaction.

It is significant to note that the court in Cushman, supra at 433, went on to state:

Where one party sues another at law for damages for breach of contract, he cannot recover if the breach complained of came about through his own act or neglect Where the innocent party has received partial performance and substantial benefit, it would be unjust to allow him to avoid his contractual duties altogether because the performance of the other party is interrupted short of completion by a breach. (Emphasis Added).

The Vermont Supreme Court again spoke in the context of minor breaches of some of the terms of a contract in Vermont Structural Steel Corporation v. Brickman, 126 Vt. 520, 523 (1967) when it observed:

In a contract, such as here, we hold the true rule to be that if there has been a substantial performance of the contract, even though there is a failure in some minor particulars, the contract price may be recovered whether there has been a substantial performance of a contract is ordinarily one of fact. We have no findings from which it may be inferred that the contract in question had not been substantially performed. (Emphasis Added).

Thus, assuming arguendo, as the Court below did, that contract law provided a basis for review of the facts of the instant case, it is respectfully submitted that the Defendants were in compliance with all their contractual obligations imposed by the various rules and regulations of Norwich University. See also, "Developments in the Law-Academic Freedom," 81 Harv. L. Rev. 1045, 1147 (1968). An examination of the specific instances of breach of "contract" claimed by the Plaintiff-Appellant will be reviewed infra.

B. The Senior Honor Committee had jurisdiction to try the Plaintiff for the offense of stealing.

The Plaintiff-Appellant's argument that the Corps Honor Committee did not have jurisdiction to try the Plaintiff for a violation of the Honor Code is specious. The concept of concurrent jurisdiction is certainly not novel, and it is clear from the regulations of the Norwich University Corps of Cadets that violations of the Honor Code are to be tried by the Honor Committee. It is also clear that stealing is a violation of the Honor Code. Thus the Plaintiff's position that a Commandant's Hearing Board was the only internal authority within the Defendant University which could try the Plaintiff for the offense of stealing is without merit. More specifically, Paragraph 2, Page 70 of the Regulations of the Norwich University Corps of Cadets provided:

Cadets may be dismissed from the University for the following reasons. Cadets who are dismissed may not re-enroll at the University at any time.

a. Cadets or other students found guilty of stealing will be dismissed as provided in the Honor Code (See Cadet Handbook and Appendix).

and the Appendix 2 on Page 89 of the Regulations provides that:

Failure to comply with the provisions of the Code can result in a student's being suspended or dismissed from the Norwich University community
.....

In view of these explicit statements contained in the Regulations, the Plaintiff-Appellant can hardly be heard to complain that the Corps Honor Committee did not have jurisdiction to hear his case. As the Court below stated, "Furthermore, Norwich's construction makes sense. Stealing is a deceitful offense suitable for an Honor Board." (Opinion and Order, Page 10, March 17,

1976). It only seems logical that if the Plaintiff-Appellant is claiming the benefits of some sort of contractual relationship with the University that he is bound by the plain and unambiguous meaning of the Honor Code and the Regulations pertaining to its enforcement.

C. The Plaintiff-Appellant's privilege against self-incrimination was not violated by the conduct of the Honor Committee.

Assuming that there was an implied contract between the Plaintiff and the Defendant University, it is clear that a person charged with a violation of the Honor Code may not be compelled to incriminate himself. The Cadet Handbook provides that an accused cadet will be informed of this right. The Handbook, however, does not specify a particular point in time at which an accused will be informed of that right.

The first observation as regards the Plaintiff-Appellant's argument is that his testimony before the Honor Committee was not self-incriminating but on the contrary was entirely exculpatory. Thus if there was a breach of "contract" by not informing him specifically of his right not to testify prior to the hearing, it was a breach that did not cause the Plaintiff harm.

The Court below took the position that "any breach of duty in this regard was secured when Bateman took an appeal from the decision of the Honor Committee . . . and failed to raise his due process objection at that time." (Opinion and Order, Page 12, March 17, 1976). This position is clearly correct. At the conclusion of the hearing on April 15, 1976 the Plaintiff was specifically informed as follows: "You are advised that an appeal may be made in writing to the President of Norwich University within 24 hours after you have been advised of the sanction to be imposed. In order for the appeal to be considered, it must present substantial new evidence or question whether the evidence presented was sufficient,

question the Hearing Committee's conduct, question the application of due process or indicate that the sanction imposed was not in keeping with Norwich University policies in such matters." (Exhibit 9, Transcript of April 15, 1975 Hearing, Page 40, submitted with Motion for Summary Judgment). The Plaintiff-Appellant, on appeal to President Hart, failed to raise this particular issue as a violation of his rights before the Honor Committee, but instead elected to enter into a new and superseding agreement with President Hart. It should also be pointed out at this time that the Plaintiff's dismissal from the University came about as a result of his admitted violation of the agreement between himself and President Hart and not as a direct result of his violation of the Honor Code.

Finally, it should be pointed out as regards to this particular issue that the Plaintiff-Appellant was informed both in the information lodged against him five days before the hearing and just prior to the commencement of the hearing that "You may present evidence in your own behalf, or testify in person . . .". (Exhibits 8 and 9, submitted with Motion for Summary Judgment). (Emphasis Added). The logical interpretation of the foregoing is that the Plaintiff-Appellant had the right to testify in his own behalf but could not be forced to. In other words, the Plaintiff-Appellant's position that a full blown Miranda-type of warning should have been given immediately prior to the commencement of the hearing is in error. Such a strict interpretation would be inconsistent with the fact that all of the individuals involved in the proceeding were lay individuals without legal training. Again, the Plaintiff made no attempt not to testify, but did in fact testify in a manner which did not incriminate himself in any respect.

D. The Plaintiff-Appellant's right to cross-examination of adverse witnesses was not violated.

The same observations made as regards the Plaintiff-Appellant's rights against self-incrimination are pertinent to his claim that he was denied the right to cross-examine adverse witnesses. Specifically, Plaintiff-Appellant contends that the reading into the record of the statement of one of the investigating officers, a Mr. Winberg, violated his right to examine adverse witnesses. First of all, the Plaintiff-Appellant had notice five days prior to the hearing that statements of Security Officers Jennings and Winberg were available and would be the basis of the case against him. When the statement was read into the record no objection was made by the Plaintiff-Appellant nor did he, at any time throughout the proceedings, request that Security Officer Winberg be presented for examination. The Affidavit of Cadet Dufresne makes it clear that had such a request been made, Officer Winberg would have been presented. (Exhibit 4, submitted with Motion for Summary Judgment). Also the other Security Officer involved in the investigation, a Mr. Jennings, was present and his testimony was essentially the same and cumulative of that outlined in Officer Winberg's statement. Finally, as the court below so ably pointed out, the Plaintiff-Appellant did not raise any objection to this procedure in his appeal to President Hart. As the court below stated, "Plaintiff's failure to take advantage of his procedural rights cannot be transformed into a breach by Norwich of its obligations." (Opinion and Order, Page 13, March 17, 1976). In short, the internal mechanism provided by the University to cure alleged procedural defects at a hearing before the Honor Committee were more than sufficient to protect the Plaintiff's interests.

E. The Plaintiff-Appellant's dismissal for his violation of the agreement between himself and the Defendant-Appellee Hart was lawful and proper.

As previously noted, upon the Plaintiff-Appellant's conviction before the Honor Committee it was recommended that he be dismissed from the University. Upon his appeal to President Hart, his dismissal from the Corps of Cadets was affirmed; however, the Plaintiff and President Hart entered into a written agreement wherein the Plaintiff was to move off campus and to come on to campus only to attend classes and to use the library. In addition, the Plaintiff was to wear civilian clothes at all times, and was to sign on and on campus. On May 9, 1975, the Defendant Colonel Wadsworth received a report that the Plaintiff was in violation of the agreement. At his appearance three days later before the Defendant Colonel Wadsworth, the Plaintiff admitted his violation of the agreement and the Defendant Wadsworth recommended his dismissal to the Defendant Hart. The Plaintiff was then afforded an opportunity to meet with the Defendant Hart and at the meeting the Plaintiff freely admitted his violation of the agreement. Subsequently, the Plaintiff was dismissed from the University.

It is unclear from the Appellant's Brief whether the Appellant is contending whether he should have received a more formal hearing before President Hart prior to his dismissal or whether he should have been afforded a hearing under the various procedures set forth in the regulations either before a Commandant's Hearing Board or the Honor Committee.

The obvious error in the Appellant's position is that he was no longer, at the time of his violation of the agreement between himself and President Hart, a member of the Corps of Cadets. Thus any contractual obligations arising under University Regulations pertaining to the Corps of Cadets were not applicable. The agreement between the Plaintiff and President Hart constituted a new and separate contract or at least a modification of the pre-

existing "contract". Parties to a contract, under Vermont law, are, of course, entitled to modify that contract by mutual agreement. Hill v. Scott, 101 Vt. 356, 143 A.276 (1928). In short, the Plaintiff had a status that must be considered unique and his own admitted violation of the agreement between himself and President Hart constituted just grounds for dismissal. The Plaintiff received all the process that was due him under the terms of the agreement.

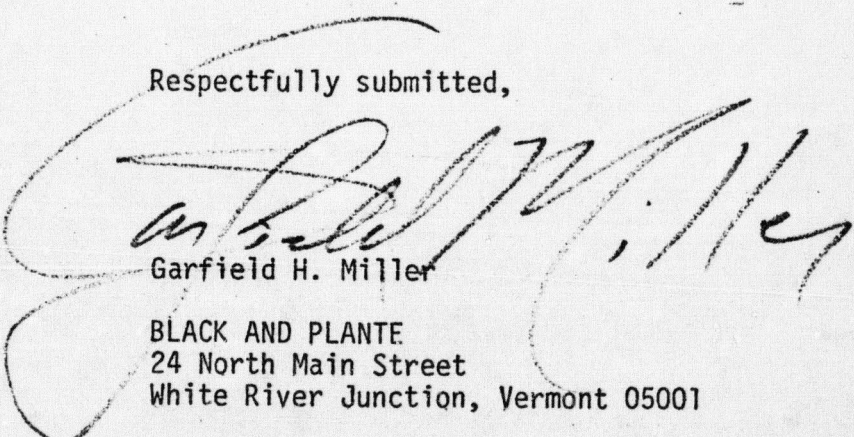
Perhaps a useful analogy in this situation is the manner in which the courts have dealt with the revocation of probation or parole where there is a claimed violation of constitutional rights. In that situation, certain rights do attach, however, the full panoply of rights due a defendant in the original criminal proceeding are not required. E.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

In the instant case it is respectfully submitted that the Plaintiff did not make any contractual agreement entitling him to more due process than he received from the Defendant Hart. His own admitted violation of the agreement clearly warranted his dismissal by President Hart and the Plaintiff cannot be heard to complain that a "contractual" right of his was violated.

SUMMARY AND CONCLUSION

The Plaintiff-Appellant received all of the rights which were due him under any "contractual" agreement between himself and Norwich University. Any minor or non-material breaches of the so-called "contract" were harmless and/or were waived by the Plaintiff by his failure to assert that claim in the internal appeals procedure provided by the University. After his dismissal from the Corps of Cadets, the Plaintiff was given a second opportunity to remain a part of the University community, albeit not as a member of the Corps of Cadets, by virtue of his agreement with President Hart. The Plaintiff admittedly violated this agreement; consequently his dismissal was entirely lawful. The chain of events leading up to his dismissal was in full accord with legal rights afforded by his enrollment in the University. Any decision to the contrary would be an unwarranted judicial intervention in the internal disciplinary affairs of a private university. Therefore, it is respectfully submitted that the Judgment of the District Court be affirmed.

Respectfully submitted,



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DATED: March 1, 1977

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